SENATE BILL No. 612

DIGEST OF INTRODUCED BILL

Citations Affected: IC 22-4.

Synopsis: State Unemployment Tax Avoidance (SUTA) dumping. Establishes the circumstances, as prescribed by federal law, in which a mandatory transfer or prohibited transfer of the resources and liabilities of an employer's experience account and contribution rate occurs for unemployment compensation purposes. Establishes criminal and civil penalties for the transfer or acquisition of a trade or business solely or primarily for the purpose of obtaining a lower employer contribution rate.

Effective: July 1, 2005.

Harrison

January 24, 2005, read first time and referred to Committee on Pensions and Labor.

Introduced

First Regular Session 114th General Assembly (2005)

PRINTING CODE. Amendments: Whenever an existing statute (or a section of the Indiana Constitution) is being amended, the text of the existing provision will appear in this style type, additions will appear in **this style type**, and deletions will appear in ~~this style type.~~

Additions: Whenever a new statutory provision is being enacted (or a new constitutional provision adopted), the text of the new provision will appear in **this style type**. Also, the word **NEW** will appear in that style type in the introductory clause of each SECTION that adds a new provision to the Indiana Code or the Indiana Constitution.

Conflict reconciliation: Text in a statute in *this style type* or ~~*this style type*~~ reconciles conflicts between statutes enacted by the 2004 Regular Session of the General Assembly.

SENATE BILL No. 612

A BILL FOR AN ACT to amend the Indiana Code concerning labor and safety.

Be it enacted by the General Assembly of the State of Indiana:

SECTION 1. IC 22-4-9-2 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2005]: Sec. 2. Except as otherwise provided in **sections 4 and 5 of this chapter,** IC 22-4-7-2(f), ~~IC 22-4-9-4,~~ and ~~IC 22-4-9-5,~~ **IC 22-4-11.5,** an employing unit shall cease to be an employer subject to this article only as of January 1 of any calendar year, if it files with the commissioner, prior to January 31 of such year, a written application for termination of coverage, and the commissioner finds that the employment experience of the employer within the preceding calendar year was not sufficient to qualify an employing unit as an employer under IC 22-4-7-1 and IC 22-4-7-2.

SECTION 2. IC 22-4-9-3 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2005]: Sec. 3. **(a) This section is subject to the provisions of IC 22-4-11.5.**

(b) Any employer subject to ~~the~~ **this** article as successor to an employer pursuant to the provisions of ~~Subsections (a) or (b) of IC 1971, 22-4-7-2~~ **IC 22-4-7-2(a) or IC 22-4-7-2(b)** ~~hereof~~ shall cease to be an employer at the end of the year in which the acquisition occurs

only if the board finds that within such calendar year the employment experience of the predecessor prior to the date of disposition combined with the employment experience of the successor subsequent to the date of acquisition would not be sufficient to qualify the successor employer as an employer under the provisions of ~~IC 1971, 22-4-7-1. Provided,~~ ~~that~~ **IC 22-4-7-1.** No such successor employer may ~~ceased~~ **cease** to be an employer subject to this article at the end of the first year of the current period of coverage of the predecessor employer. If all of the resources and liabilities of the experience account of an employer are assumed by another in accordance with the provisions of ~~IC 1971, 22-4-10-6~~ **IC 22-4-10-6** or **IC** 22-4-10-7, ~~hereof~~ such employer's status as employer and under this article is hereby terminated unless and until such employer subsequently qualifies under the provisions of ~~IC 1971, 22-4-7-1~~ **IC 22-4-7-1** or **IC** 22-4-7-2 ~~hereof~~ or elects to become an employer under ~~IC 1971, 22-4-9-4 or 22-4-9-5.~~ **sections 4 or 5 of this chapter.**

(c) If no application for termination, as herein provided, is filed by an employer ~~and/or if~~ **and** four (4) full calendar years have elapsed since any contributions have become payable from such employer, then and in such cases the board may terminate such employer's experience account.

SECTION 3. IC 22-4-10-6 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2005]: Sec. 6. (a) When:

(1) an employing unit (whether or not an employing unit at the time of the acquisition) becomes an employer under IC 22-4-7-2(a); ~~or when~~

(2) an employer acquires the organization, trade, or business, or substantially all the assets of another employer; **or**

(3) an employer transfers all or a portion of the employer's trade or business (including the employer's workforce) to another employer as described in IC 22-4-11.5-7;

the successor employer shall, in accordance with the rules prescribed by the board, assume the position of the predecessor with respect to all the resources and liabilities of the predecessor's experience account.

(b) Effective July 1, 1975, **and except as provided by IC 22-4-11.5,** when:

(1) an employing unit (whether or not an employing unit at the time of the acquisition) becomes an employer under IC 22-4-7-2(b); or ~~when~~

(2) an employer acquires a distinct and segregable portion of the organization, trade, or business within this state of another employer;

the successor employer shall, upon application and agreement by and between the disposing and acquiring employers, assume the position of the predecessor employer with respect to the portion of the resources and liabilities of the predecessor's experience account as pertains to the distinct and segregable portion of the predecessor's organization, trade, or business acquired by the successor. However, the application and agreement for the acquiring employer to assume this portion of the resources and liabilities of the disposing employer's experience account must be filed with the commissioner on prescribed forms not later than one hundred fifty (150) days immediately following the disposition date or not later than ten (10) days after the disposing and acquiring employers are mailed or otherwise delivered final notice that the acquiring employer is a successor employer, whichever is the earlier date. This portion of the resources and liabilities of the disposing employer's experience account, if transferred, shall be transferred in accordance with rules prescribed by the board.

(c) **Except as provided by IC 22-4-11.5,** the successor employer, if an employer prior to the acquisition, shall pay at the rate of contribution originally assigned to it for the calendar year in which the acquisition occurs, until the end of that year. If not an employer prior to the acquisition, the successor employer shall pay the rate of two and seven-tenths percent (2.7%) unless the successor employer assumes all or part of the resources and liabilities of the predecessor employer's experience account, in which event the successor employer shall pay at the rate of contribution assigned to the predecessor employer for the period starting with the first day of the calendar quarter in which the acquisition occurs, until the end of that year. However, if a successor employer, not an employer prior to the acquisition, simultaneously acquires all or part of the experience balance of two (2) or more employers, the successor employer shall pay at the highest rate applicable to the experience accounts totally or partially acquired for the period starting with the first day of the calendar quarter in which the acquisition occurs, until the end of the year. If the successor employer had any employment prior to the date of acquisition upon which contributions were owed under IC 22-4-9-1, ~~his~~ **the employer's** rate of contribution from the first of the year to the first day of the calendar quarter in which the acquisition occurred would be two and seven-tenths percent (2.7%).

SECTION 4. IC 22-4-10-7 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2005]: Sec. 7. **(a) Except as provided by IC 22-4-11.5,** when an employing unit (whether or not an employing unit prior thereto) assumes all of the resources and liabilities

of the experience account of a predecessor employer, as provided in ~~IC 1971, 22-4-10-6 hereof~~ **section 6 of this chapter,** amounts paid by such predecessor employer shall be deemed to have been so paid by such successor employer. The experience of such predecessor with respect to unemployment risk, including but not limited to past payrolls and contributions, shall be credited to the account of such successor.

(b) The payments of benefits to an individual shall not in any case be denied or withheld because the experience account of an employer does not reflect a balance and total of contributions paid to be in excess of benefits charged to such experience account.

SECTION 5. IC 22-4-11-2 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2005]: Sec. 2. (a) **Except as provided in IC 22-4-11.5,** the commissioner shall for each year determine the contribution rate applicable to each employer.

(b) The balance shall include contributions with respect to the period ending on the computation date and actually paid on or before July 31 immediately following the computation date and benefits actually paid on or before the computation date and shall also include any voluntary payments made in accordance with IC 22-4-10-5:

(1) for each calendar year, an employer's rate shall be determined in accordance with the rate schedules in section 3 of this chapter; and

(2) for each calendar year, an employer's rate shall be two and seven-tenths percent (2.7%), except as otherwise provided in IC 22-4-37-3, unless and until:

(A) the employer has been subject to this article throughout the thirty-six (36) consecutive calendar months immediately preceding the computation date; and

(B) there has been some annual payroll in each of the three (3) twelve (12) month periods immediately preceding the computation date.

(c) In addition to the conditions and requirements set forth and provided in subsection (b)(2)(A) and (b)(2)(B), an employer's rate shall not be less than five and four-tenths percent (5.4%) unless all required contribution and wage reports have been filed within thirty-one (31) days following the computation date and all contributions, penalties, and interest due and owing by the employer or ~~his~~ **the employer's** predecessors for periods prior to and including the computation date have been paid:

(1) within thirty-one (31) days following the computation date; or

(2) within ten (10) days after the commissioner has given the employer a written notice by registered mail to the employer's last

known address of:

(A) the delinquency; or

(B) failure to file the reports;

whichever is the later date.

The board or the board's designee may waive the imposition of rates under this subsection if the board finds the employer's failure to meet the deadlines was for excusable cause. The commissioner shall give written notice to the employer before this additional condition or requirement shall apply.

(d) However, if the employer is the state or a political subdivision of the state or any instrumentality of a state or a political subdivision, or any instrumentality which is wholly owned by the state and one (1) or more other states or political subdivisions, the employer may contribute at a rate of one percent (1%) until it has been subject to this article throughout the thirty-six (36) consecutive calendar months immediately preceding the computation date.

(e) On the computation date every employer who had taxable wages in the previous calendar year shall have the employer's experience account charged with the amount determined under the following formula:

STEP ONE: Divide:

(A) the employer's taxable wages for the preceding calendar year; by

(B) the total taxable wages for the preceding calendar year.

STEP TWO: Multiply the quotient determined under STEP ONE by the total amount of benefits charged to the fund under section 1 of this chapter.

(f) One (1) percentage point of the rate imposed under subsection (c) or the amount of the employer's payment that is attributable to the increase in the contribution rate, whichever is less, shall be imposed as a penalty that is due and shall be deposited upon collection into the special employment and training services fund established under IC 22-4-25-1. The remainder of the contributions paid by an employer pursuant to the maximum rate shall be:

(1) considered a contribution for the purposes of this article; and

(2) deposited in the unemployment insurance benefit fund established under IC 22-4-26.

SECTION 6. IC 22-4-11.5 IS ADDED TO THE INDIANA CODE AS A **NEW** CHAPTER TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2005]:

Chapter 11.5. Assignment of Employer Contribution Rates and Transfers of Employer Experience Accounts

Sec. 1. Notwithstanding any other provision of this article, this chapter applies to the assignment of contribution rates and transfers of employer experience accounts after December 31, 2005.

Sec. 2. As used in this chapter, "administrative law judge" means a person appointed by the commissioner under IC 22-4-17-4.

Sec. 3. As used in this chapter, "person" has the meaning set forth in section 7701(a)(1) of the Internal Revenue Code.

Sec. 4. As used in this chapter, "trade or business" includes an employer's workforce.

Sec. 5. As used in this chapter, "violates or attempts to violate" includes:

(1) the intent to evade;

(2) misrepresentation; or

(3) willful nondisclosure.

Sec. 6. If the commissioner obtains information concerning a possible violation of this chapter, the commissioner shall promptly refer the matter to an administrative law judge for a hearing and decision under IC 22-4-32-1 through IC 22-4-32-15.

Sec. 7. (a) If:

(1) an employer transfers all or a portion of the employer's trade or business to another employer solely to obtain a lower contribution rate; and

(2) at the time of the transfer, the two (2) employers have substantially common ownership, management, or control;

the successor employer shall assume the experience rating of the predecessor employer for the resources and liabilities of the predecessor employer's experience account that are attributable to the transfer.

(b) The contribution rates of both employers shall be recalculated and made effective on the date that the transfer described in subsection (a) is effective.

Sec. 8. (a) If an administrative law judge determines that an employing unit or other person that is not an employer under IC 22-4-7-1 or IC 22-4-7-2 at the time of the acquisition has acquired an employer's trade or business solely for the purpose of obtaining a lower employer contribution rate, the employing unit or other person:

(1) may not assume the experience rating of the predecessor employer for the resources and liabilities of the predecessor employer's experience account that are attributable to the

acquisition; and

(2) shall pay the applicable new employer contribution rate as determined under IC 22-4-10.

(b) In determining whether an employing unit or other person acquired a trade or business solely for the purpose of obtaining a lower employer contribution rate under subsection (a), the administrative law judge shall consider the following:

(1) The cost of acquiring the trade or business.

(2) Whether the employing unit or other person continued the business enterprise of the acquired trade or business.

(3) The length of time the employing unit or other person continued the business enterprise of the acquired trade or business.

(4) Whether a substantial number of new employees were hired to perform duties unrelated to the business enterprise that the trade or business conducted before the trade or business was acquired.

Sec. 9. A person who knowingly:

(1) violates or attempts to violate:

(A) section 7 or 8 of this chapter; or

(B) any other provision of this article related to determining the assumption or assignment of an employer's contribution rate; or

(2) advises another person for pecuniary gain in a way that results in a violation of:

(A) section 7 or 8 of this chapter; or

(B) any other provision of this article related to determining the assumption or assignment of an employer's contribution rate;

commits a Class C misdemeanor.

Sec. 10. (a) In addition to any other penalty imposed, a person who is convicted of a misdemeanor under section 9 of this chapter is subject to a civil penalty under this section.

(b) This subsection applies to a person who is an employer (as defined in IC 22-4-7-1 or IC 22-4-7-2). If the administrative law judge determines that a person is subject to a civil penalty under subsection (a), the administrative law judge shall assign an employer contribution rate equal to one (1) of the following as a civil penalty:

(1) The highest employer contribution rate assignable under this article for:

(A) the year in which the violation occurred; and

(B) the following three (3) years.

(2) An employer contribution rate of two percent (2%) of the employer's taxable wages (as defined in IC 22-4-4-2) for the year in which the violation occurred and the following three (3) years, if:

(A) an employer is already paying the highest employer contribution rate at the time of the violation; or

(B) the increase in the contribution rate described in subdivision (1) is less than two percent (2%).

(c) This subsection applies to a person who is not an employer (as defined in IC 22-4-7-1 or IC 22-4-7-2). If the administrative law judge determines that a person is subject to a civil penalty under subsection (a), the administrative law judge shall assess a civil penalty of not more than five thousand dollars ($5,000).

(d) All civil penalties collected under this section shall be deposited in the unemployment insurance benefit fund established by IC 22-4-26-1.

Sec. 11. Notwithstanding section 10 of this chapter, if the administrative law judge finds that imposition of a civil penalty required to be imposed would be unjust under the circumstances, the administrative law judge may do either of the following:

(1) Waive the penalty.

(2) Reduce the penalty to an amount specified by the administrative law judge.